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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 335

L. METCALFE WALLING, ADMINISTRATOR,
Petitioner,
versus
NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY,
Respondent.

No. 336

L. METCALFE WALLING, ADMINISTRATOR,
Petitioner,
versus
PORTLAND TERMINAL COMPANY,
Respondent.

BRIEF OF JACKSONVILLE TERMINAL COMPANY, AS AMICUS CURIAE, IN OPPOSITION TO PETITIONS FOR CERTIORARI.

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SCOPE OF THIS BRIEF.

The above two cases involve the question of whether so-called "trainees" in railroad operations are employees under the Wage and Hour law (29 U. S. C. A. 201, 203 (d) (e) (g) *et seq.*).

Some years ago the Administrator conceived the theory that such trainees were employees, although the railroads, the unions, and the men themselves, were thoroughly satisfied with the arrangement under which it had been mutually agreed that they were not employees.[1]

The first suit brought by the Administrator was against the Jacksonville Terminal Company. After extensive hearing, since this was recognized as a test case, the District Court for the Southern District of Florida filed its findings and conclusions that the trainees were not employees, and denied the injunction sought by the Administrator. See *Walling v. Jacksonville Terminal Company*, 55 Fed. Sup. 302. We quote from page 304, the District Court's description of the trainee (expressly quoted and approved by the Fifth Circuit at 148 F. (2d) 768, 769):

> "None of the usual indicia of the employee relationship exists here as to the trainee. He is not subject to the rules of defendant applicable to employes; no control is exercised over his time; he is not required to report at any specified time; defendant has no right to demand or require work from him; *he comes and goes as he pleases; he is his own free agent*[2] and

[1] It is clear why the men voluntarily enter into the present arrangement. As it now stands, after undergoing a brief training period they then receive the full journeyman's contract wage. Immediately on being placed on the payroll they are paid the same as the men who have been there for years, instead of having to work up to that rate by degrees. As stated by the Court in Skidmore v. Swift (1944) 323 U. S. 134, 138, 65 S. Ct. 161, 89 L. Ed. 124, 128: "The law does not impose an arrangement upon the parties. It imposes upon the *courts* the task of finding what the arrangement was". Here the courts below have made exhaustive findings as to what the arrangement was—an arrangement satisfactory to everyone except the Administrator.

[2] Italics here and elsewhere throughout this brief are ours unless otherwise indicated.

both he and defendant understood and agreed he is not to be paid during the training period."

This case was appealed to the Fifth Circuit and on April 23rd, 1945, at 148 F. (2d) 768, the Fifth Circuit unanimously affirmed the judgment of the District Court.

The Administrator recognized that he could not overturn this decision in the *Jacksonville Terminal* case, and accordingly he did not file petition for certiorari.

Thereafter the Administrator brought suits against the Portland Terminal Company, the Nashville, Chattanooga & St. Louis Railway and the Norfolk Southern Railway Company. *He lost every last one of them.* Each specifically adopted and followed the reasoning of the *Jacksonville* case. To date the Administrator (while he has been before seven different courts) has not found a single one[3] which agreed with his attempt to substitute his social and economic views for what the railroads, the unions and the trainees had agreed on and practiced for so many years.

The *Portland Terminal Company* case was decided by the District Court of Maine, reported at 61 F. Supp. 345,

[3] This is particularly significant when we consider that the Administrator was able to and did carefully select the defendant and the jurisdiction for each case. Practically every railroad in the country has had the trainee system for many years. Accordingly the Wage and Hour Division could assay the situation and select the factual background which it thought most favorable to it. Moreover, the Administrator could bring his suits in the particular jurisdictions where he thought he had the best chance of winning. This is just what he did and he has brought to date (but lost) suits in the First, Fourth, Fifth, and Sixth Judicial Circuits. These were carefuly planned and tried test cases in four different circuits.

and, on April 29th, 1946, was affirmed by the First Circuit, reported at 6 W. H. Cases 26, 155 F. (2d) 215.

The *Nashville, Chattanooga & St. Louis Railway* case was decided by the District Court for the Middle District of Tennessee, reported at 60 F. Supp. 1004,[4] and was affirmed by the Sixth Circuit on June 1st, 1946, reported at 6 W. H. Cases 81, 155 F. (2d) 1016.

The *Norfolk Southern* case was decided on July 9th, 1946, by the District Court for the Eastern District of North Carolina, and is reported at 6 W. H. Cases 252. In addition to finding against the Administrator, it also taxed the costs against him.

Counsel for the Jacksonville Terminal Company file this brief as *Amicus Curiae* for the reason that the petitions for certiorari here are, in reality, an attack by indirection on the fundamental reasoning of the *Jacksonville* decision, since all of the other cases have followed it. This is true although the Petitioner (Pet. 12) is careful to explain the distinction between the *Jacksonville* and the other cases.

In the opinion of the Sixth Circuit in the *Nashville, Chattanooga & St. Louis Railway* case, for example, the Court said at page 82 of 6 W. H. Cases, 155 F. (2d) 1018:

> "The Jacksonville case, upon its facts, is in all material aspects similar to the case in hand, and we

[4] We invite a careful reading of Judge Strum's opinion here, for it is a masterful analysis of, and a complete answer to, the Administrator's various arguments *reiterated* in the Petition.

are satisfied with the reasoning thereof. To say more would constitute surplusage.

"The decree is affirmed upon the authority of that case and for the reasons indicated therein."

In the *Portland Terminal* case the First Circuit, after discussing at length the holding in the *Jacksonville* case, affirms the District Court and states at page 219 of 155 F. (2d):

"Hence we feel that the principles set forth in the Jacksonville Terminal Co. case are applicable here."

And the Petitioner (Pet. 12) says:

"Both courts relied heavily on *Walling v. Jacksonville Terminal Co.*"

We feel it our duty, therefore, to file this brief as *Amicus Curiae* and bring to the attention of the Court the applicable principles of the *Jacksonville* case, since what the Administrator is seeking here is in reality a reversal by indirection of the fundamental reasoning of the *Jacksonville* case through the medium of certiorari in these two cases.

Under the doctrine of *res judicata* the decision in the *Jacksonville* case has long since become final so far as the Jacksonville Terminal Company and its employees are concerned. None the less, there are numerous other situations in the Fifth Circuit, and elsewhere, similar to that at Jacksonville, which have relied on the *Jacksonville* case. It is important, therefore, that the reasoning there applied should not now be disturbed.

CONSENT TO FILING.

We have filed with the Clerk consent by all of the parties to the filing of this brief, in accordance with Rule 27.9 of this Court.

SUMMARY OF ARGUMENT.

I. Trainee is not an employee.

II. Trainee is not only not an employee but is *not an employee necessary or essential to commerce.*

III. There being substantial evidence to support the findings of the trial courts, their decrees should be affirmed.

IV. There is nothing in the Legislative history of the Act showing Congressional Intent to cover these trainees under the Act.

V. Section 14 of the Act (29 U. S. C. A. 214) does not cover these trainees.

VI. Wages are due according to principles of contract, not of tort.

ARGUMENT.

I. Trainee Is Not An Employee.

Seven courts have now had this situation before them, and each has come to the same identical conclusion—that the trainee was not intended to be, and is not, an employee.

In the *Jacksonville* case the Fifth Circuit at 148 F. (2d) 769, 770, said:

> "The district court summarized the situation thus (55 F. Supp. 302, 304):
>
> " 'None of the usual indicia of the employee relationship exist here, as to the trainee. He is not subject to the rules of the defendant applicable to employees; no control is exercised over his time; he is not required to report at any specified time; defendant has no right to demand or require work from him; he comes and goes as he pleases; and both he and defendant understand and agree he is not to be paid during the training period.' The conclusion of law is thus stated: 'It is not the purpose of the Fair Labor Standards Act to create new wage liabilities, but where a wage liability exists, to measure it by the standards fixed by law. If one has not hired another expressly, nor suffered nor permitted him to work under circumstances where an obligation to pay him will be implied, they are not employer and employee under the act.'
>
> "We approve the above summarization of the facts. The legal conclusion is quoted from an early decision of this Court, Bowman v. Pace, 5 Cir. 119 F. 2d 858, from which we see no reason to recede. The Act, Sect. 3(e) (g) defines 'employee' as any individual

employed by an employer; and 'employ' as including 'to suffer or permit to work'. The last quoted words do not mean that every one who permits some one to work for a third person or the worker's own self becomes an employer bound to pay statutory wages. They mean that one is an employer if he permits another to work for him, though he has not expressly hired or employed him. The mere fact that he could have prevented the service does not make him in all cases an employer. A purely voluntary service, for which no one intends there shall be pay, is not employment, but a gift. To permit another to work in my shop in making or repairing something for himself, would not make him my employee. *The words 'suffer or permit to work' must be understood with common sense.* In the present case the Company did suffer the trainee to work on its premises and with its appliances, but the benefit immediately in view was to the trainee, that he might learn, might qualify himself for a job which he desired. While studying the rule book or observing the yards and the crews he was doing nothing to the benefit of the Company. When he was allowed to fire the engine, or throw switches or transmit signals, it was for his instruction. The Company was not benefitted, for it had present a man hired to do it who would have done it but for the presence and interference of the trainee. And the parties had formally agreed that what was done was not for the Company, but for the trainee's benefit and that no pay was expected. The agreement was made in good faith and represented the truth of the relationship. The trainees are not child-laborers, nor economically oppressed persons, nor in danger of injury by sub-standard living during the short period of training. The regular employees have all been trainees, and are now members of the powerful unions

of railroad men, and some of the trainees with railroad experience no doubt are members too. These unions recognize the trainee's status and their contracts with the Company provide for the acceptance of them as employees. No abuse sought to be remedied by the Fair Labor Standards Act appears. *We see no occasion to give an unreasonable interpretation to its words to upset this practice, apparently satisfactory to all concerned.*"

In the *Portland* case the First Circuit prefaces at 155 F. (2d) 217 its discussion (which concludes that the trainee is not an employee) with these pungent and self-answering questions:

> "But did Congress intend to include in the classification of employees all persons whom an employer suffers or permits to work? Did Congress intend to compel an employer to pay the minimum wage required by the Act to a person who voluntarily and purely for his own benefit seeks to labor under an employer's control? Suppose an author desired to work in the train yards in preparation for writing a novel and requested the Portland Terminal Company to give him an opportunity to do so. Would the Terminal Company be obligated to pay him the minimum wage, when the author neither sought nor expected pay? It hardly seems that Congress intended the act to cover such an individual."

And in the *Chattanooga* case the Sixth Circuit (at 6 W. H. Cases 81, 155 F. (2d) 1017) specifically approves findings of fact made by the District Court (reported at 60 F. Supp. 1004), from which we quote:

> "When a trainee enters upon his training, he does not regard himself as an employee, nor does the

Company so regard him. * * * During the training period the Company exercised no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee.

"No orders are issued to him * * *. If he is absent, such absence does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, * * *.

"Students are present on the job purely for their own benefit and advantage, in order to qualify themselves for future employment. * * *"

In the *Norfolk Southern* case, 6 W. H. Cases 252, 254, the Court made findings of fact very similar to those in the *Chattanooga* case just quoted from, and reached the same conclusion. In addition, at page 255, the Court made the significant finding of fact that no one but the Administrator had any complaint to make as to the trainee program either before or since the filing of the suit.

In *Williams v. Jacksonville Terminal Company*, (1942) 315 U. S. 386, 398, 62 S. Ct. 659, 86 L. Ed. 914, 925, this Court held that although Red Caps were suffered and permitted to work by this same terminal company and did the essential work of handling baggage in interstate commerce, yet if they had not agreed with the terminal company on the terms of their employment they *would not be employees*. We quote the Court's exact language:

"If the red cap did not accept the terms offered, *he would be a volunteer and not an employee*. As a

> volunteer he could probably keep his tips but would not be entitled to a contractual wage."

The Court in the *Red Cap* case went to the very heart of this controversy and pointed out that under the Act the relationship of employee and employer is a *contractual* one. In view of the specific findings of all of the trial judges who have heard the evidence, it is impossible for us to reconcile the Administrator's position with what the Court has said in the *Red Cap* case.

We conclude this portion of the brief with what the Court said in the *Tennessee, etc., Company v. Muscoda Local 123,* (1944) 321 U. S. 590, 64 S. Ct. 698, 88 L. Ed. 949,

> "And in the absence of a contrary legislative expression, we cannot assume that Congress here was referring to work or employment other than as those words were *commonly used*—as meaning physical or mental exertion (whether burdensome or not) *controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.*"

Here the railroads neither controlled nor required the efforts of the trainee, and seven courts have agreed his efforts were necessarily and primarily for his benefit—rather than that of the railroads.

II. Trainee Is Not Only Not An Employee But Is NOT AN EMPLOYEE NECESSARY OR ESSENTIAL TO COMMERCE.

Petitioner recognizes his obligation, as shown by the affirmative allegations of his complaints in the various cases, to show that trainees *are employees essential to commerce.*

This Court in *McLeod v. Threlkeld,* (1943) 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, has held that it is not the work of the employer that matters but the work of the individual employee concerned. And, as pointed out in that case, since numerous railroad employees are not covered by the Act, such as workers in repair shops on facilities to supply power for machinery used in repairing instrumentalities of transportation, or workers who heat the cars and the depot, or who store fuel, or workers who work on locomotives and cars when withdrawn for the moment from commerce for repairs, or cooks, or elevator operators, or building service employees, because not necessary to commerce, just so the trainees here are not covered for the same reason.

The Administrator throughout this whole series of litigation *either does not perceive or deliberately chooses to ignore the fundamental distinction between a man who is hired to do a job and is responsible for it and a mere volunteer who comes and goes as he pleases.*

As pointed out in the various findings of fact in the several cases, under their union contracts the railroads are

required to keep a full crew. The trainee is merely a fifth wheel. Whatever the trainee does is done while a man more experienced and better able to do it, and charged with the responsibility therefor, stands by. It is only common sense that the trainee necessarily slows down the work of the crew, as the crew must not only show him what to do and how to do it, but, in addition, protect the trainee and see that he does not get hurt.

Merely demonstrating ability or acquiring skill in a job does not make the trainee necessary or essential to commerce. Since the crew is a full crew, and can and does do its work irrespective of the trainee, the trainee is in no sense essential or necessary to commerce or engaged in commerce.[4a]

III. There Being Substantial Evidence To Support The Findings Of The Trial Courts, Their Decrees Should Be Affirmed.

There is no need to labor this point for nothing is better settled than that findings of the trial courts, approved by the Circuit Courts of Appeals, will not be disturbed by the Supreme Court.

IV. There Is Nothing In The Legislative History Of The Act Showing Congressional Intent To Cover These Trainees Under The Act.

In the *Jacksonville* case, after the argument of counsel, lasting the better part of a day, the trial Judge himself inquired if there were anything in the legislative history

[4a] See syllabus 6 at 55 F. S. 302, 304, where the Court so held.

to throw light on the coverage of these trainees. In response to this query, both sides made exhaustive investigation of the legislative history. We attach, as Appendix "A" to this brief, our historical study submitted to the District Judge. It is significant that not only Judge DeVane in the *Jacksonville* case, but all of the other courts which have since gone into the question, have come to the same conclusion and stated in so many words that there was no intention on the part of Congress to cover these trainees.

V. Section 14 Of The Act (29 U. S. C. A. 214) Does Not Cover These Trainees.

At the conclusion of the argument in the *Jacksonville* case, Judge DeVane further asked if Section 14 could have any possible bearing. This came after the Administrator's counsel had demonstrated clearly that he appreciated the fact that Section 14 had no application by not even mentioning it during the course of his extensive argument.

In the petition here the Administrator again attempts to resurrect Section 14, although, as pointed out by the Fifth Circuit at 148 F. (2d) 770, and by the First Circuit at 155 F. (2d) 219, Section 14, by its "very wording, *presupposes employment*" and we have no "employment" here.

And as said by the Sixth Circuit at 155 F. (2d) 1018, "If trainees are to be considered as 'employees' then the long entertained concept of voluntary apprenticeship passes entirely away".

See also the *Chattanooga* opinion at 60 Fed. Supp. 1004, 1008, where the Court points out that "a learner is an '*employee*' who labors *in the interest of* and for the benefit of his employer * * *", factors not present here.

VI. Wages Are Due According To Principles Of Contract, Not Of Tort.

As cited on pages 20 *et seq.* of the Petition, there are *some* [5] cases which hold that trainees who are performing duties for a railroad at the time they are injured or killed, are employees insofar as a suit against the railroad *in tort* is concerned. None of these cases involves wages. One of these very cases relied on and *cited by Petitioner*, that of *Atchison, etc. v. Fronk*, (1906) 74 Kan. 519, 87 Pac. 698, squarely held:

> *"It was perfectly competent for him to agree to serve an apprenticeship without pecuniary consideration."*

Moreover, as said by the Fifth Circuit, in answering this same contention, at 148 F. (2d) 771:

> "Similarly the many cases cited as to the liability in tort for personal injuries suffered by persons in training are far afield. The varying duties and degrees of care to be observed for the safety of persons exposed to danger are not the touchstones for this Act, which relates only to the wages to be paid employees. We repeat what we said in Bowman v. Pace supra (119 F. 2d 861) that 'Wages are due according to principles of contract not of tort.'"

[5] There are cases to the contrary. See Fineberg v. Public Service Ry. Co. (N. J. 1919) 108 Atl. 311; Wilkes v. Buffalo R. Co. (Pa. 1907) 65 Atl. 787, 788, 789; Lederson v. Cassidy (N. Y. 1921) 187 N. Y. S. 50; and Norfolk R. Co. v. Bondurant (Va. 1908), 59 S. E. 1091.

CONCLUSION.

The Petitioner gives as the reasons for granting the writs that the decisions of the Courts below "are out of harmony with the statutory definition of employment, the clear purpose of the learner provisions of the Act, and even the common law tests of the employment relation". (Pet. 13.)

As stated by the Fifth Circuit at 148 F. (2d) 770, "The words 'suffer or permit to work' (the statutory definition) *must be understood with common sense*", and that is what seven courts have done. The same seven courts have further found that the learner provisions of the Act, by the specific terms of Section 14, *"presuppose employment"* and that there is no *employment* here. As to the common law tests of the employment relation, no one has even suggested that the trainee could go to Court and recover wages from the railroads under the common law.

We repeat again what the Court said in *Skidmore v. Swift, supra,* that *"the law does not impose an arrangement on the parties.* It imposes on the *courts* the task of finding what the arrangement was". And no one could have had a more definite and clearly understood legally binding contractual arrangement than that which all seven courts have found the Railroad Brotherhoods, the trainees and the railroads worked out and practiced here.

We respectfully assert, therefore, that none of the Petitioner's "reasons" are valid; and that this arrangement

mutually agreed on and satisfactory to the railroads, the unions and the trainees for so many years, should not now be disturbed.

The petitions for certiorari should be denied.

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September, 1946.

APPENDIX "A"—Reprint of Historical Study of Act submitted to District Court in Jacksonville Case.

There Is Nothing in the Legislative History of the Act Showing Congressional Intent to Cover These Trainees Under the Act.

The light to be sought in the legislative history is that thrown on the purposes of the Act (29 U. S. C. A. 202). They are: to remedy "labor conditions detrimental to the maintenance of the minimum standard of living" of workers engaged in interstate commerce because a substandard

"(1) causes commerce * * * to be used to spread and perpetuate such labor conditions among workers of the several states;

"(2) burdens commerce * * *;

"(3) constitutes an unfair method of competition in commerce;

"(4) leads to labor disputes burdening and obstructing commerce * * *; and

"(5) interferes with the orderly and fair marketing of goods in commerce."

It is manifest to anyone who heard the testimony or reads the record in this case that the arrangements under which the trainees become qualified for employment by the Terminal Company

(1) do *not* cause "commerce * * * to be used to spread and perpetuate" those arrangements "among workers of the several states" (Those arrangements admittedly are time honored and universally existent with terminal companies);

(2) do *not* "burden commerce";

(3) do *not* constitute "an unfair method of competition in commerce" (For they are used by all terminal companies (Wilkes, R. 313));

(4) do *not* "lead to labor disputes burdening and obstructing commerce" (Wilkes offered to but was not permitted to say so (R. 313), as to the Terminal Company, and there is no suggestion that the arrangements have caused such disputes in other terminals);

(5) do *not* "interfere with the orderly and fair marketing of goods in commerce."

Further, the declared policy of the Act (29 U. S. C. A. 202 (b)), is, where the detrimental conditions aimed at do exist, to eliminate them "as rapidly as practicable * * * without substantially *curtailing employment or earning power.*" The arrangements here attacked by the administrator not only do not "curtail" employment by the Terminal Company—they extend it to persons who in the absence of the company's training program could never qualify for such employment; and instead of "curtailing" earning power they enlarge it.

It was on the foregoing considerations that we submitted at the oral argument, and submit still, the appropriateness to this case of the statement of the Supreme Court in *McLeod v. Threlkeld*, decided June 7, 1943, 87 L. Ed. 1538, 1542, 319 U. S. 491, 495:

> "The effect of the over-refinement of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope, is not to be repeated in the administration and operation of the Fair Labor Standards Act."

A refinement more refined than that by which the administrator here seeks wages for men who in the thought of nobody else ever were employed, instead of being content to restrict his activities to the enforcement of the payment of minimum wages and the maintenance of maximum hours which confessedly were the great objectives of the Act, would be hard to imagine.

In searching the Act's legislative history therefore, we do so in the light of the declared purposes and policy of the Congress and of the just quoted statement of the Supreme Court.

The result of our search has been that nothing has been found to cash doubt on our submission that "any individual" does not come within the Act unless he is an "*employee*" * * * employed by an "employer". (29 U. S. C. A. 203 (e)).

We find nothing to indicate that if Congress had meant literally that any and every individual suffered or per-

mitted to work was an employee, adequate language to express that concept clearly would not have been used in an Act whose verbiage throughout is precise, cleancut and specific.

And we find nothing to indicate either that Congress meant to wipe out our conception of the legal relation of master and servant by general, obscure and ambiguous language in an Act drawn otherwise with precision, clarity, and definiteness.

We also do not find, as he is quoted on page ten of the administrator's brief as having said, that Senator Black stated that the definition, "'*employ' includes to suffer or* permit to work," is "the broadest definition that has ever been included in any one Act." What Senator Black did say was as follows, and in a wholly different connection: The question before the Senate was whether producers and packers of fresh fruits and vegetables should be included in or excluded from the operation of the Act. In response to a question from Senator Copeland, Senator Black said:

> "The committee, after careful consideration reached that conclusion that the definition of *employees* as given in paragraph (7) of Section 2 and which is the broadest definition that has ever been included in any one Act, was sufficient to include every genuine *bona fide* farming activity" (81 Cong. Rec. 7657 (1937)).

Though not strictly within this portion of this brief, it may as well be noted here as elsewhere, that while the Congress has almost uncontrollable discretion in adopt-

ing definitions of its own, it could not have changed, if it had tried, the essential, long-recognized nature of the relationship of master and servant, merely by adopting its own definition of the word "employ". Our authority for this statement is *Carter v. Carter Coal Company*, 298 U. S. 238, 289, 80 L. Ed. 1160, 1177 (holding an imposition designated by a statute as a "tax" to be in legal reality a penalty):

> "While the lawmaker is entirely free to ignore the ordinary meanings of words and make definitions of his own (citing cases) that device may not be employed so as to change the nature of the acts or things to which the words are applied."

That case has not been disavowed by the Supreme Court, even in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. Ed. 1263, for there they were construing, not the Act held unconstitutional by the *Carter Coal Company* case, but instead the Bituminous Coal Act of 1937 which Congress had passed as a sequel to the *Carter* case. And so, while Congress had full power to ignore the ordinary meaning of "employ" and adopt a new definition of it, that "device" did not change the nature of employer and employee or the nature of the relation between them.

The original Senate Bill (S-2475) read, in Sec. 2 (a) (7):

> "'*Employee*' includes an individual employed or suffered or permitted to work by an employer."

This is the same definition that was stated at the oral argument by counsel for the administrator. It is not, of course, the definition of the Act itself which is as follows:

> "(e) 'employee' includes any individual *employed* by an employer."

No special attention apparently was paid by the Congress to the definition (29 U. S. C. A. 203 (g)) that " 'employ' includes to suffer or permit to work". All the discussions seem to have used the words "employer" and "employee" in their conventional sense. For example, in foot-note 1 to 29 U. S. C. A. 206, it is said of the Congressional Committees' handling of the point whether the Act should apply to all persons employed by an employer who was engaged in commerce, or whether it should apply only to such persons as themselves were engaged in commerce:

> " 'Section 6 of the conference agreement provides for the establishment of minimum wages for *employees* engaged in commerce or in the production of goods for commerce. The House amendment provided for the establishment of minimum wages if the *employer* was engaged in commerce in any industry affecting commerce. * * *'
>
> " 'Section 7 of the conference agreement provides for the establishment of maximum hours of employment for *employees* engaged in commerce or the production of goods for commerce. The House amendment provided for the establishment of maximum hours of employment if the *employer* was engaged in commerce in an industry affecting commerce. * * *' "

The Senate Bill was referred to the Committee on Education and Labor, and in its report (No. 884) July 6, 1937, is this language—certainly not descriptive of the trainees with the Jacksonville Terminal Company:

> "It is only for those low-wage and long-working-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to obtain a minimum wage."

In similar vein, the House Committee on Labor said in its report (No. 1452) to the House of Representatives on August 6, 1937:

> "It (the bill) only attempts in a modest way to raise the *wages* of the most poorly paid workers and *reduce* the *hours* of those most overworked."

The objectives of the pending bill were thus described by Madam Secretary Perkins (Joint Committee Hearing, Part 1, page 177):

> "The present draft of the fair labor standards bill has three main objectives. First, to exclude from the channels of commerce goods produced by industries *employing* child labor and engaging in other oppressive labor practices. Second, to *establish* basic non-oppressive *wage and hour standards* and to apply them as rapidly as possible to industries of an interstate character; and third, to create a board to fix fair minimum wages and a reasonable workweek for industries where the *bargaining power of workers* has not been sufficiently great to achieve fair working conditions and collective agreements" (J. H., Part I, p. 177).

Even the thumbing through of the voluminous debates on the bill while it was pending, particularly before the Senate, demonstrates that those were the objectives of which everybody was thinking; and that *nobody had any idea, or at least never expressed any idea, that a tricky definition would be written into the bill serving the purpose of making employees out of people who had never been hired, who had been promised no wages, who expected none, who came and went as they pleased, and were under no obligation of any sort to the one whom the bill nevertheless would compel to pay them.* For example, Senator Black, in opening the discussion of the bill generally, said (81 Cong. Rec. 7648):

> "The general purpose of the bill, legislatively speaking, is a three-fold one.
>
> "It provides a method of obtaining the objective of minimum wages and maximum work hours * * *
>
> "There is one provision of the bill which * * * would authorize action in connection with those businesses and industries that are seriously competing with and have a substantial effect upon the flow of interstate commerce.
>
> "The third objective of the bill is to prohibit the transportation in interstate commerce of goods which are produced by the work of children."

Senator Borah, a member of the Senate Committee having the bill in charge, felt (81 Cong. Rec., p. 7793) that the crux of the matter before the Senate was "how shall we reach the problem of minimum wages and maximum hours. I feel that every man or woman who is worthy of *hire* is entitled to sufficient compensation to maintain

a decent standard of living. It is upon that theory that I proceeded to the consideration of the measure, and upon that theory I now consider it."

Throughout his ensuing discussion such statements as these occur (p. 7796, *et seq.*):

> "I take the position that a man who *employs* another must pay him sufficient to enable the one employed to live. * * * If he cannot afford to pay it, then we should close up the business. * * * I insist that American industry can pay its *employees* enough to enable them to live * * * I am opposed to peon labor whether it is employed by one man or another."

Senator Walsh during his address to the Senate made the statement (p. 7800):

> "The purpose and intent of the bill is that the poorest, the lowest, the humblest *wage earner* in this country should not be left helpless because he has not the facilities of a *labor organization* to help him enjoy social justice."

At the joint hearing before the Senate Committee on Education and Labor and the House Committee on Labor, the following colloquies occurred between the Representatives named below and (the then Assistant Attorney General, now Mr. Justice) Robert H. Jackson:

> "Representative Fitzgerald: What provision is there in the bill to *aid the handicapped or the subnormal worker*?
>
> Mr. Jackson: That is at page 19 of the Senate Bill, where the regulations or orders of the Board may provide for—the *employment of learners* and appren-

tices *at such wages lower* than the applicable wage and subject to such limitations as to time, number, proportion, and length of service as the Board shall prescribe; * * *

Representative Fitzgerald: Then this Board will have the power to grant exemptions to the *aged*, the *handicapped*, and the *subnormal* workers? * * *

Mr. Jackson: Yes, sir.

Representative Griswold: You spoke a while ago of the difference in the efficiency of labor. In this bill in section 19 you mention learners and apprentices. Does the bill at any place define learners and apprentices, that you recall?

Mr. Jackson: I do not recall any definition of learners or apprentices.

Representative Griswold: The reason I ask that question is this. Under the N. R. A. in the garment industry, they *employed* girls, and in a number of factories with which I am familiar, they put them on one machine, and for a certain length of time they were learners. Then they learned that machine and they were transferred to another machine and they were still learners. And I have some affidavits in my office of girls that performed as much as 6 months, the operations in a factory, worked say 6 months in a factory on numerous machines, and they were always learners. They never even received the minimum pay because they were always learners.

Mr. Jackson: *That is exactly why the provisions are in here* which your colleague pointed out which authorize the Board, when they give the authority to *employ* learners or apprentices, to fix the limitations as to the time, the number, the length of time,

and the service, so that they cannot pull that kind of abuse under this act if it is effectively enforced" (Pages 37, 38 and 44, Part I, of Joint Committee Hearing).

Representative Fitzgerald and Mr. Jackson, discussing Section 14, said (Joint Committee Hearing, Part I, pp. 37, 38):

"Representative Fitzgerald: But it does give the Board the power to increase or decrease the amount of apprentices?

Mr. Jackson: Yes, sir.

Representative Fitzgerald: Would there not be some conflict there with organized trades that already limit the number of apprentices?

Mr. Jackson: No; I think not. There is no such purpose here—in the first place, there could not be anything that would *require the employer to hire apprentices.* It would merely be a permission, and he would still have to deal with his union in the case of collective bargaining, and the provisions of the act which are intended to protect collective bargaining would prevent that as a practical matter."

On page 20 of his brief plaintiff seemingly attempts to show that the fact that Congress did not adopt an amendment to exempt from the Act the "employment" of learners for the first six months, has some bearing on the case. Surely there is no analogy. The amendment is not relevant. In the first place, the amendment covered "employment", a situation not presented here. Secondly, and undoubtedly the reason Congress refused to adopt the amendment, six months is an unreasonably long period

(The average trainee here, for example, trained about six days).

But let us see just what is done during this training period. There are two phases to the knowledge, experience and training necessary to qualify firemen, hostler-helpers and switchmen employees of the defendant.

One is a knowledge of the trade or employment; i. e., a fireman must know how to lay his fire, put on coal, put water in the boiler, etc.; and a switchman must know how to throw switches, give signals, couple and uncouple cars, and connect and disconnect air and steam hose, etc. When a man has such knowledge and experience he can apply his knowledge on any train, wherever it may be, just as a welder or a riveter who understands his trade can work in any shipyard. This may be called knowledge of the trade.

The other phase to qualify a man as an employee of defendant (or any other railroad for that matter) is a knowledge of the particular terminal plant, its track layout, switches, lights, signals, etc. This may be called knowledge of the yard. Most of the trainees for defendant are either new to railroad terminal activities, or if they have ever worked for a railroad it has been so remote that for practical purposes they are "inexperienced" men. Accordingly it is safe to say that the trainees as a whole acquire their knowledge of the yard as they acquire their knowledge of the trade. The former is an incident to the latter.

All of the witnesses testified to the intricacy of the defendant's yards, tracks, interlocking systems and switches. All of them agreed that it required considerable time and study to learn and understand the signals, rules, regulations and the yard layout. These features are all peculiar to the defendant's plant and before a man can be employed to work there, he must, for safety to himself, his fellow-employees and the public, have learned and know the layout of the yard, tracks, switches, systems, signals and other facilities, and generally acquire the knowledge of the yard.

But in so acquiring the training, whether it be as to the type of work generally or the characteristics peculiar to the defendant's yard, the trainee is not an employee but is a volunteer. *He has not agreed to work* under the principles of contract law stressed by the Supreme Court in the redcap case. He is in the yard *on his own*, as a free agent, subject to his own whims and caprices. He may never work for the defendant—some of the trainees do not. *If* he likes the work and is adapted to it, he *may*, at *his* option, seek and secure employment. It is perhaps significant that in the few instances where an experienced railroad man has gone through the training, it has only taken him a day or so to qualify for *employment*. This may possibly have something to do with the willingness of all trainees to accept the status of volunteers through the training period.

And so defendant submits that in the light of the Congressional history hereinabove discussed and outlined, it was not the intent of Congress that the inclusion of a few

so-called experienced men with the inexperienced men in defendant's training program should affect the status of such men as volunteer trainees on defendant's property.

We repeat: There is nothing in the legislative history of the Act which suggests, even remotely, that Congress intended that the Act should apply to individuals who were not already employees, whose activities did not originate from any agreement or contract with an employer. On the other hand the record plainly implies that everybody concerned with the new legislation considered that it would be directed to those individuals who work pursuant to a contract of employment whereby the employer agreed to pay wages and employees agreed to observe the duties of their employment—in short that the Act, as it is popularly known, was a "wage and hour law" for the benefit of persons who already were employees, and not a law intended unsuspectingly to transform into employees persons who never had been such employees.

Section 14 of the Act (29 U. S. C. A. 214) Does Not Cover These Trainees.

The very first words of section 14 indicate that it is dealing with a status of employer and employee already existing, and not creating a new status. It says: "The administrator, *to the extent necessary* to prevent curtailment of *opportunities for employment* shall * * * provide for (1) *employment* of learners", etc.

Furthermore, this record does not show, or even suggest, that it is "necessary" to any "extent" that the Ter-

minal Company's hitherto successful and satisfactory training program cannot proceed without the benefit of Section 14.

And, as already submitted in another connection, whatever else the arrangements here between the Terminal Company and the trainees do, they do not curtail, but on the contrary extend and enlarge, opportunities for employment.

In addition, general rulings of the administrator show that at least when they were promulgated he was not of the view that nobody could learn a trade without becoming an "employee", so-called, of the very man from whom he hoped, having learned the trade, to obtain employment.

The administrator's Interpretative Bulletin No. 13 (as revised November, 1940) deals, in Section 15, with training courses made available by employers for their employees, and prescribes four conditions in the presence of which attendance by an employee is "not to be considered hours worked". The *purpose* of such conditions, it is therein said, "is to prevent exploitation of labor in violation of the Act by using alleged training programs to effect a stretch-out or speed-up in the work of employees in their present position"—something disavowed by the Terminal Company, not claimed by any witness, and not suggested by anything in the record.

Regulation 522.1 (29 U. S. C. A., p. 600), dealing with "Application for Learners", prescribes that "Application

may be made by any employer to the administrator * * * to *employ* learners * * * whenever employment of learners at such lower rate is believed *necessary* to prevent curtailment of employment opportunities".

The mere reading of that language by those who heard the trial and the oral arguments suggests that there is nothing compulsive on the Terminal Company as to the circumstances comprising the trainees' relations with it; that it does not desire to "employ" *learners*, until they become qualified to do the company's work; and that when they do, they are employed, not as learners, but as full-fledged employees. Nobody believes—the Terminal Company, the trainees, the administrator himself—that the "employment" of "learners", visualized by Section 14, is necessary to prevent the shutting of the door of opportunity in the face of men who want to work for the Terminal Company, or to quote from the Section, "to prevent curtailment of opportunities in such plant".

What Congress had in mind when it enacted Section 14, as shown by the Congressional history, was to guard against exploitation of low paid employees in the sweat shop. For in the sweat shop there were actually employed, under the guise of "learners" or "apprentices", *bona fide* workers who were under the direction and orders of the employer and from whose sweat and toil the employer reaped economic benefit. Congress never intended Section 14 to cover volunteer trainees who were not exploited, from whom the employer received no economic benefit, and who were *not employed*.